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Supreme Court, U.S.
FILED
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No. 03-200

CORRECTED COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

STATE OF ARIZONA

Petitioner,

vs.

EUGENE ROBERT TUCKER

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Eugene Robert Tucker, requests permission to file the attached Respondent's Brief In Opposition without prepayment of costs and to proceed *in forma pauperis*.

Respondent proceeded through all phases of the Arizona Superior Court, Court of Appeals, and Arizona Supreme Court as an indigent defendant with counsel appointed by Maricopa County. An affidavit supporting this motion is attached.

RESPECTFULLY SUBMITTED this 4th day of September, 2003.

MARICOPA COUNTY PUBLIC DEFENDER

By Edward F. McGee for

CHRISTOPHER V. JOHNS
Deputy Public Defender
11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8200
State Bar Attorney No. 010021
Lawyer for Respondent

25 pp

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, **EUGENE ROBERT TUCKER**, am the respondent in the preceding captioned case. In support of my motion to proceed without being required to prepay fees, costs or give security, I state that because of my poverty I am unable to pay the costs of this case or to give security, and I believe I am entitled to redress.

I SWEAR that the statements made below relating to my ability to pay costs of proceedings in this case are true:

1. I am presently unemployed, except for duties related to my incarceration and I have not been employed since I was arrested for this offense.
2. I am presently not receiving income, or have received income by employment since by incarceration for this offense.
3. I have no cash on hand sufficient to pay for costs, or checking or savings accounts maintained by banking institutions.
4. I do not own real property, stocks, bonds, notes or other assets that could be used to pay for costs and fees in this case.
5. I have been represented at public expense during all phases of proceedings and have no dependents.

I declare under penalty of perjury that the foregoing is true and correct.

OFFICIAL SEAL
M. McCARVILLE
NOTARY PUBLIC - State of Arizona
MARICOPA COUNTY
My Comm. Expires Oct. 28, 2006

Eugene Tucker
EUGENE ROBERT TUCKER

Dated and signed this 7 day of ~~September~~ October, 2003.

My Commission Expires: Oct 28, 2006

M. McCarville
Notary Public

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, EUGENE R. TUCKER II #157363, respondent am the ~~petitioner~~ in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0.	$ N/A
Self-employment	$ 0.	$ 0.	$ 0.	$ 0.
Income from real property (such as rental income)	$ 0.	$ 0.	$ 0.	$ 0.
Interest and dividends	$ 0.	$ 0.	$ 0.	$ 0.
Gifts	$ 0.	$ 0.	$ 0.	$ 0.
Alimony	$ 0.	$ 0.	$ 0.	$ 0.
Child Support	$ 0.	$ 0.	$ 0.	$ 0.
Retirement (such as social security, pensions, annuities, insurance)	$ 0.	$ 0.	$ 0.	$ 0.
Disability (such as social security, insurance payments)	$ 0.	$ 0.	$ 0.	$ 0.
Unemployment payments	$ 0.	$ 0.	$ 0.	$ 0.
Public-assistance (such as welfare)	$ 0.	$ 0.	$ 0.	$ 0.
Other (specify): _____	$ 0.	$ 0.	$ 0	$ 0.
Total monthly income:	$ 0.	$ 0.	$ 0	$ 0.

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
INCARCERATED LAST 4 YRS.		N/A	$ 0
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Single		N/A	$
			$
			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
NONE	0	$ 0	$ 0
INCARCERATED		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model 0
Value

☐ Motor Vehicle #2
Year, make & model 0
Value

☐ Other assets
Description Nothing INCARCERATED
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	INCARCERATED	

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ Single
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ Nothing	$ Single
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$
Life	$	$
Health	$	$ N/A
Motor Vehicle	$	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):	$	$
Total monthly expenses:	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I AM INCARCERATED ON DEATH ROW

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 7, 2003

X _____
(Signature)

No. 03-200

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

STATE OF ARIZONA

Petitioner,

vs.

EUGENE ROBERT TUCKER

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTOPHER V. JOHNS
Deputy Public Defender
(Counsel of Record)
11 West Jefferson, Suite 5
Phoenix, Arizona 85003-2302
(602) 506-8200
State Bar Attorney No. 010021
Lawyer for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the Arizona Supreme Court's interpretation of this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*) violates the Sixth Amendment to the United States Constitution by requiring a jury to determine aggravating and mitigating factors?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Arizona Supreme Court's opinions involving Eugene Robert Tucker, III (Tucker or Respondent) are reported respectively at *State v. Ring,* 204 Ariz. 534, 65 P.3d 915 (Ariz. 2003) (referenced as *Ring III* by Petitioner) and *State v. Tucker,* ____ Ariz. ____, 68 P.3d 110 (Ariz. 2003).

A jury convicted Tucker of three counts of first-degree murder, as well as burglary, sexual assault and kidnapping. Following a short hearing, the trial court imposed the death sentence on the then nineteen-year-old Respondent, by deciding that the aggravating elements in the case outweighed the mitigating factors.

The case proceeded to mandatory review by the Arizona Supreme Court. In the interim, this Court issued its opinion in *Ring v. Arizona,* 536 U.S. 584 (2002) (referenced as *Ring II* by Respondent) (reversing *State v. Ring,* 200 Ariz. 267, 25 P.3d 1139 (2001) (*Ring I*)). On remand to the Arizona Supreme Court, Tucker's case was consolidated with all capital cases then on direct appeal from the state's trial courts. *Ring III* resolved numerous common issues to Arizona capital defendants on appeal, including that error could be harmless under Arizona's "superseded capital sentencing statute...." *Tucker,* ____Ariz. ____ at ¶ 54.

Upon an individual examination of issues specifically raised by Tucker, the Arizona Supreme Court did find that the murder of one of the victims was cruel beyond a reasonable doubt. Contrary to the State's claim, the Arizona Supreme Court made no finding that the evidence was "overwhelming." (Petitioner's Writ at p. 1).

As to the other victims, the Arizona Supreme Court determined that it could not find beyond a reasonable doubt that the murders were cruel, heinous or depraved. *Tucker* at ¶ 64. The Court also held that a jury, under Arizona's newly enacted capital sentencing statute, could have found that the mitigating factors were sufficient to impose a sentence other than death. *Id.* at ¶¶ 67-68. Consequently, the Court remanded Tucker's case for resentencing. *Id.* at ¶ 69.

As of this date, the case is pending a jury trial on the punishment issue. (*See* Appendix A (superior court minute entry)).

JURISDICTION

Tucker does not dispute that the Petitioner's Jurisdiction statement sets forth the proper time limitations, constitutional provisions and rules.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent argues that in addition to the Constitutional provisions set forth in Petitioner's petition that the Eighth Amendment is also implicated. It provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

REASONS FOR DENYING THE PETITION

I. The Arizona Supreme Court did not err in its interpretation of *Ring v. Arizona,* 536 U.S. 584 (2002) (*Ring II*), in Eugene Robert Tucker's case by requiring a jury determination of all aggravating elements and mitigating factors under a state statute enacted after this Court's decision in *Ring*.

Dissatisfied with the Arizona Supreme Court's decision on remand of *Ring v. Arizona,* 536 U.S. 584 (2002) (referred to as *Ring II* by Petitioner), the State of Arizona seeks relief from this Court on a slender thread by seizing upon this Court's language in *Ring II*, that "a death sentence may not legally be imposed unless *at least one aggravating factor* is found to exist beyond a reasonable doubt." 536 U.S. at 596. (Italics added by the State). The gist of the State's flimsy contention is that the above language coupled with *Ring II's* holding, creates the precedent for this Court to approve of a statutory capital sentencing scheme based upon a jury finding of a single aggravating factor or element. Then, under Petitioner's logic, a judge could determine the remaining aggravating elements (if they exist), and mitigating factors. According to the State "[t]he Arizona Supreme Court's expansive reading of *Ring II* is unwarranted given the narrow scope of the issue addressed in *Ring II*...." (Petitioner's Writ at p. 4).

Bypassing the legislature, the State of Arizona wants to create a bifurcated system in Arizona where a jury would determine one aggravating factor and then be dismissed. According to the State, then the trial judge could and would find any remaining aggravating factors, should they exist, and *all* mitigating factors. The trial court would then weigh the aggravating elements of the crime against the mitigating factors and impose a sentence of death, life without parole, or life with the possibility of parole after a person serves twenty-five calendar years at a minimum.

And why does the State of Arizona want, what at best would be a bipolar sentencing scheme—for a jury to find one aggravator (and a judge to find any additional aggravating elements, as well as mitigating factors) to make a person eligible for the death penalty? Cost. It will cost more to provide the approximately twenty-five defendants affected by *Ring II* with a penalty phase jury trial then to simply have a judge make the determination.

Conspicuously absent from the State's analysis is the capital statutory sentencing scheme enacted by the Arizona legislature following *Ring II*. This Court's decision in *Ring II* rendered Arizona's capital sentencing provisions unconstitutional. The State immediately responded by enacting a new statutory scheme that requires a jury to determine all aggravators and mitigators, as well as balance them to make a decision as to whether a death sentence may be imposed. *See* Act of Apr. 27, 2001, ch. 260, § 1, 2001 Ariz. Sess. Laws 1334 (Ariz. Rev. Stat. Ann. (A.R.S.) § 13-703.01). (Appendix B).

A state may not adopt a valid statute and then decide willy-nilly to ignore it. Yet, Petitioner wants to do exactly that. Nothing in the decision by the Arizona Supreme Court deciding the impact of *Ring II* on remand, or under the individual facts of Tucker's case is inconsistent with the statutory scheme enacted by the Arizona Legislature.

For example, the Arizona Supreme Court held in *Ring III* that applying Arizona's new sentencing statutes does not violate federal or state prohibitions against Ex Post Facto application of law. There is no suggestion by the State of Arizona that the present statute under which Tucker will be sentenced is unconstitutional.

II. No compelling grounds exist to grant a writ of certiorari since the Arizona Supreme Court's decision is wholly consistent with Sixth and Eighth Amendment Jurisprudence. Neither decision below nor the record raises the Question Presented by Petitioner.

Apparently, the State just refuses to see the truck barreling down the middle of the road. Justice Scalia, however, articulated the guiding fundamental principle of modern death penalty jurisprudence several years ago in his dissenting opinion in *Almendarez-Torres v. United States,* 523 U.S. 224, 257 n.2 (1998), by writing that:

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to a jury trial on *all the elements of the charge.* (Italics added).

Albeit written in dissent, it seems unambiguous that a majority of the members, if not all of the Supreme Court, agree with Justice Scalia that jury *sentencing* in capital cases is mandated by the Eighth Amendment. Despite the State of Arizona's contorted logic, in *Ring II,* a majority of this Court reached the same conclusion on the basis of the Sixth Amendment. *See also Cole v. Arkansas,* 333 U.S. 196 (1948); *Presnell v. Georgia,* 439 U.S. 14, 16 (1978). *Ring II's* logic unequivocally holds that "Arizona's enumerated aggravating factors operate as the 'functional equivalent of an element of the greater offense.'" *Ring v. Arizona,* at 609 (quoting *Apprendi v. New Jersey,* 530 U.S. 466, at 494 n. 19 (2000)). Under the State's *Ring II* theory of interpretation, once the jury finds a single element, the trial court is free to find the rest of offense elements without a jury.[1]

---

[1] The Arizona Supreme Court in *Ring III,* 204 Ariz. 534, 65 P.3d at 943, also observed that the legislature's intent would be frustrated if different sentencers evaluated the presence and strength of aggravation and mitigation. *See also State v. Bible,* 175 Ariz. 549, 858 P.2d 1152 (1993) (expressing strong preference for remand where there is error in capital sentence because of fairness and accuracy are promoted by single fact finder who can consider all evidence).

Then, of course, there is the State's blind eye to the Eighth Amendment in its petition. The Eighth Amendment imposes special limitations on the process of sentencing a capital defendant. *See generally Payne v. Tennessee,* 501 U.S. 808 (1991). Reliability and accuracy are likewise paramount in a capital case. *See Gilmore v. Taylor,* 508 U.S. 333, 342 (1993). Petitioner offers no explanation of how an eligibility determination by a judge heightens the accuracy and reliability of Arizona's sentencing structure. Nor does the State delineate error by the Arizona Supreme Court in its application of *Ring II.*

Without more, this Court has no reason to grant the State's petition.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 4th day of September, 2003.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

CHRISTOPHER V. JOHNS
Deputy Public Defender
(Counsel of Record)
11 West Jefferson, Suite 5
Phoenix, Arizona 85003-2302
(602) 506-8200
State Bar Attorney No. 010021
Lawyer for Respondent

No. 03-200

IN THE

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OCTOBER TERM, 2003

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Petitioner,

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Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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11 West Jefferson, Suite 5
Phoenix, Arizona 85003-2302
(602) 506-8200
State Bar Attorney No. 010021
Lawyer for Respondent

APPENDIX A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-015293 07/16/2003

HONORABLE JEFFREY A. HOTHAM

CLERK OF THE COURT
D. Rudd
Deputy

FILED: 07/17/2003

STATE OF ARIZONA

PATRICIA L STEVENS
PAUL J MCMURDIE

v.

EUGENE ROBERT TUCKER

GENE R STRATFORD
GREG CLARK

VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

The Arizona Supreme Court affirmed the conviction of the Defendant on all counts and remanded the matter to the Superior Court for re-sentencing by trial on the First Degree Murder counts, mandate dated 06/02/2003, and the matter was assigned to this Court for the reason that Judge Jones is no longer handling a criminal calendar.

The State filed a Motion to Stay Proceedings pending resolution of the State's petition for certiorari to the United States Supreme Court. No objection to the State's Motion has been filed by the defense.

IT IS THEREFORE ORDERED granting the State's Motion to Stay Proceedings until 08/04/2003, the deadline that the State has to file its petition in the United States Supreme Court. If the State does file its petition for certiorari, the Court will telephonically review with counsel whether this Court's stay will remain in place after 08/04/2003.

APPENDIX B

13-703.01. Sentences of death or life imprisonment; imposition; sentencing proceedings; definitions

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death. If the state has not filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under section 13-703, subsection F.

C. If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.

D. If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.

E. At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant.

F. The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under section 13-703, subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.

G. At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life.

I. If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.

J. At the aggravation phase, if the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating

circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

K. At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

L. If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

M. Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.

N. If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

O. In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.

P. The trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence.

Q. Subject to the provisions of section 13-703, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present and to present information at the penalty phase. At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.

R. For the purposes of this section:

1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.

2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.